

SUPREME COURT OF THE OGLALA SIOUX NATION

OGLALA SIOUX TRIBE

PINE RIDGE INDIAN RESERVATION

OGLALA SIOUX TRIBE,

CIV. APP.-2010-759

Petitioner/Appellee,

vs.

MEMORANDUM DECISION

ALLTEL COMMUNICATIONS LLC,

Respondent/Appellant

BEFORE CHIEF JUSTICE SWALLOW, ASSOCIATE JUSTICES AMERICAN HORSE, MARSHALL, AND JONES

Alltel Communications has appealed from a decision of the lower court granting temporary injunctive relief preventing it from removing certain wireless communications equipment from the Pine Ridge Indian reservation. Alltel contends that the lower court acted without jurisdiction because no underlying complaint for injunctive relief was filed prior to entry of preliminary injunctive relief and that the lower court lacked both subject matter jurisdiction over the dispute and personal jurisdiction over it. For the reasons stated herein this Court finds that the procedural error committed by the lower court in granting preliminary injunctive relief was cured by the filing of a summons and complaint and that the lower court acted within the strictures of federal law when it asserted jurisdiction. However, the lower court erred by failing to refer the dispute to arbitration as stipulated to in the original contract between the Tribe and Alltel's predecessor in interest. This Court therefore refuses to reverse the lower court's award of preliminary injunctive relief, but remands to the lower court with directions to stay all further proceedings pending arbitration of the dispute. This Court does find, however, that the lower court has exclusive jurisdiction to enforce any arbitration decision in this case.

## FACTS PRESENTED

The Oglala Sioux Tribe (hereinafter OST) filed for a preliminary injunction against Alltel contending that it intended to remove certain property from the Pine Ridge Indian reservation without the consent of the Tribe allegedly in violation of an agreement between the OST and WWC License LLC, an indirect subsidiary of Alltel. That agreement, the Tate Woglaka Service Agreement (hereinafter TWSA) provided that WWC would provide cellular telecommunications on the Pine Ridge Indian Reservation and it did so from 2000 until the lower court action was commenced. The TWSA provides that WWC would not assign its rights or obligations under the contract to any other party without notice to the Tribe and approval of the OST, provided such approval is not unreasonably withheld or delayed. In 2005 Alltel acquired the parent company of WWC. On June 5, 2008 Alltel merged with Verizon Wireless, another cellular phone company. As a condition of that merger being approved by the Department of Justice, DOJ required Alltel and Verizon to divest themselves of their wireless communications services in certain areas, including the State of South Dakota. See *United States v. Verizon Communications Inc.*, 607 F. Supp 2d 1 (D.D.C. 2009).

The OST requested that Verizon and Alltel sell their wireless communications assets on the Reservation to it for \$1, to which both balked as the Justice Department was requiring that they divest to one buyer for the entire state. Instead, Verizon and Alltel proceeded with a public auction process for the divestiture resulting in an agreement whereby AT&T Mobility agreed to buy all of Alltel/Verizon assets in 18 states including South Dakota. There is no dispute but that the Tribe was not contacted regarding the transfer of assets to AT&T.

On October 21, 2009 the Tribe brought this instant action by filing a "Petition for Preliminary Injunction and Request for Hearing", in which it requested injunctive relief against Alltel selling the cellular communications property on the reservation to AT&T, and mailed the same to the registered agent for Alltel in South Dakota by certified mail. Alltel then approached the Tribe about attempting to resolve the matter outside of Court. A hearing set for November 4, 2009 was cancelled pursuant to a stipulation for continuance of hearing and for Dismissal of Respondent Verizon Wireless. Those discussions proved fruitless however and the matter was put back on the docket for February 18, 2010. Alltel then sought federal court intervention to prohibit the Tribal Court from hearing the dispute and to force the parties to submit to arbitration of the dispute. The tribal court hearing set for February 18, 2010 was apparently cancelled due to inclement weather. The federal court denied Alltel a temporary restraining order instead ruling that it was up to the Tribal Court to determine its own jurisdiction prior to the federal court determining the federal question of whether the Tribal Court could exercise jurisdiction over the dispute. See National Farmer's Union Insurance Co. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) and Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 14 (1987)(requiring exhaustion of tribal court remedies prior to the invocation of federal question jurisdiction to determine tribal court adjudicatory authority over non-Indian litigants.)

On May 13, 2010 the Tribal Court denied Alltel's motion to dismiss finding that the petition for preliminary injunctive relief constituted the complaint. The Court also held that it had jurisdiction over Alltel under tribal law. The lower court demurred on the issue of service ruling that defective service would only be grounds to continue the matter or to dismiss without prejudice. The lower court issued a preliminary injunction preventing Alltel from removing the cellular communications property from the Pine Ridge reservation pending a trial on the merits

of the Tribe's amended complaint. The lower court also ruled that the arbitration provision in the TWSA agreement did not deprive the Tribal Court of jurisdiction over the dispute also, although the lower court did not explain how or why it should exercise jurisdiction over the ultimate merits of the dispute simultaneous with an arbitration of the dispute.

On May 18, 2010 the federal district court for the District of South Dakota issued an order requiring the parties to this dispute to submit to arbitration the issue of whether the Tribe has unreasonably withheld its consent to the transfer of assets under the TWSA agreement and whether the TWSA agreement vests in the Tribe any rights to the spectrum, network equipment and other assets used to provide phone service on the reservation. The Court refused however to enjoin the Tribal Court from determining its jurisdiction over the dispute.

#### **ISSUE #1**

**WHETHER THE DENIAL OF A MOTION TO DISMISS FOR LACK OF JURISDICTION IS IMMEDIATELY APPEALABLE OR MUST BE PURSUED AS AN INTERLOCUTORY APPEAL.**

“The Supreme Court shall have exclusive jurisdiction of all appeals from final Orders and Judgments of the Oglala Sioux Tribal Court. In addition to the jurisdiction provided for in Section 6.4, the Supreme Court shall also have jurisdiction to entertain Interlocutory Appeals, wherein, the Appellant seeks to challenge the person and/or subject matter jurisdiction of the Trial Court.” Tribal Code §§ 6.4, 6.7. Because the lower court determined it had jurisdiction over the Appellant and the subject matter of the dispute below the Court finds that the order below was a final order and therefore an appeal properly lied.

## ISSUE #2

### WHETHER THE FAILURE OF THE TRIBE TO FILE AN UNDERLYING COMPLAINT DEPRIVED THE LOWER COURT OF JURISDICTION TO GRANT TEMPORARY INJUNCTIVE RELIEF.

The Trial Court erred when it granted the Tribe's temporary injunction against Alltel without requiring the filing of a proper summons and complaint. "[N]o preliminary injunction shall be issued absent clear and convincing proof by specific evidence that the applicant will suffer irreparable harm during the pending . . . litigation. Tribal Code § 20.24. The United States Supreme Court held that a preliminary injunction was appropriate to prevent further harm to the petitioner during trial; however, the injunction was granted only after a proper summons and complaint had been filed in the District Court. Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 325 (1999). The Oglala Sioux Tribal Court acknowledged that the Tribe had failed to file a fact-based complaint. May 13 Order at 1 (PA-1). "All civil proceedings shall be *commenced* by filing a complaint with the clerk, accompanied by appropriate filing fee." Tribal Code § 20.2 (emphasis added). "A complaint is a concise written statement of the *essential facts* constituting the claim. *Id* (emphasis added). The Tribal Code cites the Federal Rules of Civil Procedure as authoritative in the absence of Tribal rules. Tribal Code § 6.18. Rule 3 states "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. A preliminary injunction cannot be construed as a complaint, but rather it is pendent relief granted a party who has commenced a legal action. The Tribal Court therefore erred when it granted a preliminary injunction without hearing and without the filing of a proper summons and complaint.

### ISSUE #3

#### WHETHER THE TRIBE'S SUBSEQUENT FILING OF A SUMMONS AND COMPLAINT CURED ANY FAILURE TO FILE THE SAME ORIGINALLY.

The Tribal Code does not address amended complaints, and there may be some tension between the two sections of the Code that guide this issue. Section 6.18 states that the Supreme Court “*shall follow and apply the Federal Rules of . . . Civil Procedure*” if the procedural issue is not covered by the Code. Tribal Code § 6.18 (emphasis added). However, section 20.9 states “all other details of judicial procedure *may* be set out in . . . Federal Rules of Civil Procedures in the absence of Tribal rules.” Tribal Code § 20.9 (emphasis added). In any event, the Oglala Supreme Court has the authority, at least discretionary if not required, per the Tribal Code, to follow the Federal Rules of Civil Procedure.

The Tribe failed to file an official complaint with the Tribal Court; however, “a party may amend its pleading only with the opposing party’s written consent *or the court’s leave*. The court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2) (emphasis added). A court may use its discretion to determine whether to permit amendments to a pleading or complaint. Id.

As a general rule, amendments to pleadings should be allowed in the furtherance of justice to permit the correction of errors and omissions on the part of the pleader and to insure that every case, so far as possible, may be determined on its real facts. Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment. Denying a motion to amend a pleading without any justifying reason appearing for the denial is an abuse of discretion.

61A Am. Jur. 2d Pleading § 693. The United States Supreme Court held that the Federal Rules of Civil Procedure are specifically designed “to further the due process of law that the Constitution guarantees.” Nelson v. Adams USA, Inc., 529 U.S. 460, 465 (2000). Thus, the

Trial Court did not abuse its discretion when it allowed the Tribe to amend its complaint to cure the initial error it made by granting a preliminary injunction without the filing of a proper complaint. This Court therefore finds that the Court's preliminary injunction below was not procedurally flawed.

However in the OST's brief to this Court it asserts that it not only has filed a summons and complaint with the lower Court , but that it has served the same upon Alltel. Alltel takes issue with that and continues to assert in its reply brief that it has never been served with the either the original or amended pleadings in this case. This is a matter for the lower court to review; indeed if there is no proof of service upon Alltel the proceedings below are fatally flawed and should be dismissed because service of process is a condition precedent to the assertion of jurisdiction under the Oglala Sioux Tribal Code.

#### ISSUE #4

#### WHETHER THE OGLALA SIOUX TRIBE HAS JURISDICTION OVER ALLTEL COMMUNICATIONS, LLC.

The Tribe has jurisdiction over Alltel under the Oglala Sioux Tribe: Law and Order Code §§ 1, 6.4, and the first Montana exception. Montana v. United States, 450 U.S. at 565. Alltel's contention that it was not a principal to the original agreement between WWC and the Tribe ignores the fact that by obtaining the assets of Verizon and its subsidiaries Alltel assumed any legal responsibilities of those parties, including the liability of being sued in a jurisdiction which had authority over a dispute involving Alltel's assignors. A party cannot defeat a tribal court's jurisdiction over a commercial dispute by asserting that it had no direct consensual relationship with the Tribe or its members when it knowingly acquires those commercial contacts later through contract. Otherwise Tribal Courts could not exercise jurisdiction over a variety of

commercial interests that “enter” the reservation through commercial transactions that they inherited from Parties who did enter into consensual commercial relationships with the Tribe.

The Oglala Sioux Tribal Code states “[a]ny person who is not a member of the Oglala Sioux Tribe shall be deemed as having consented to the jurisdiction of the Oglala Sioux Tribe by . . . [t]he transaction of any business, [l]easing or permitting of any land or property” or “[a]ny contractual agreement entered into within the exterior boundaries of the Pine Ridge Indian Reservation.” Tribal Code § 20(A)(1, 5, 8). The Tribal Code references an express clause that is to be included in all leases and official actions which places the contracting parties on notice that by conducting business with the Tribe they agree to the Tribe’s jurisdiction when they sign the contract.

It is beyond peradventure that Alltel was not a party to the original contract between the Tribe and WWC. However, it is equally beyond dispute but that Alltel knowingly merged with Verizon and assumed the liabilities and assets of Verizon and its subsidiaries. One of those “liabilities” is the contract between WWC and the Tribe wherein WWC agreed that the Tribe would have a right to object to a transfer of WWC assets. If a party can escape the first prong of the Montana test for the exercise of tribal court jurisdiction over non-Indians by asserting that it was not a direct party to the agreement, even though it clearly now has commercial transactions with the Tribe and its members through assignment, such a rule could potentially defeat the right of the Tribe to regulate a variety of commercial interests who enter the reservation as assignees of non-Indians who had “consensual relations” with the Tribe.

For example to simplify what appears to be fairly complex facts in this case, suppose a commercial entity enters into a contract to sell an automobile to the Tribe on the reservation and that entity assigns its rights to a bank who then, in violation of tribal law, unlawfully repossesses



the vehicle on the reservation in contravention of tribal law. The Bank should certainly be subject to the strictures of tribal law and jurisdiction, even though it did not directly enter into the commercial relationship with the Tribe. The federal courts have upheld the rights of Indian tribes to regulate off-reservation commercial interests who attempt to remove commercial property from the reservation. . In Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9<sup>th</sup> Cir. 1984) cert denied, 466 U.S. 926 (1984) the Court upheld the right of the Navajo Tribe to apply its repossession laws to off-reservation car dealers, even though the dealers did not have a commercial situs on the reservation and all transactions arising between the tribal members there and the dealers arose off the reservation. The Court noted that the Tribe has an interest in maintaining the “reservation peace and to protect and the health and safety of tribal members. The act of repossession “clearly threatens or has some direct effect on the health and welfare of the Tribe.”Id. at 592-593

The United States Supreme Court has held that Indian tribes exercise full sovereign rights over their members, and in some situations non-member Indians, but with regard to non-Indians that sovereignty has been diminished due to their dependent status on the United States. In the area of criminal jurisdiction Indian Tribes have lost the authority to govern individuals who are non-Indian, even if the non-Indian lives within the limits of its reservation. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1987). “[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”

In the civil jurisdiction arena however, tribal court jurisdiction is not totally proscribed, but is certainly circumscribed. In Montana v. United States, 450 U.S. 544 (1981) the United States Supreme Court held that Indian tribes could not regulate the activities of non-Indians on privately-owned fee land within the exterior boundaries of an Indian reservation absent a

showing that the non-Indian has entered into “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” or the activities of the non-Indian “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.” Montana, at 565-566. It is important to note, however, that the Court in Montana also concluded, with little discussion, that the Tribe’s authority to regulate the activities of non-Indians on tribal or trust land was relatively unrestricted. The Supreme Court, in subsequent decisions, went on to clarify that the Montana standard for the tribal exercise of regulatory authority also applied to other lands within an Indian reservation and was not necessarily applicable only to privately-owned fee lands. See South Dakota v. Bourland, 508 U.S. 679 (1993)(tribal authority over non-Indians on lands taken by United States under Flood control act proscribed under the Montana standard).

However, two exceptions were recognized in Montana granting Indian tribes jurisdiction over non-Indians:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66.

Later United States Supreme Court pronouncements on tribal authority over non-Indians recognize that entities that enter into commercial transactions on Indian reservations are subject to tribal authority. The United States Supreme Court has recognized that an Indian tribe has the right to tax non-Indians that remove oil and gas from the trust lands within the exterior

boundaries of an Indian reservation. See Merrion v. Jicarilla Apache Tribe, 455 US 130 (1982); see also Kerr-McGee v. Navajo Tribe of Indians, 471 US 195 (1985). In Merrion, in response to the argument by the non-Indians being taxed that the Tribe had no inherent authority to regulate non-Indians on trust lands within reservation boundaries the Court strongly disagreed and stated that this authority “does not derive solely from the Indian tribe’s power to exclude non-Indians from tribal lands. Instead, it derives from the Tribe’s general authority, as sovereign, to **control economic activity within its jurisdiction**, and to defray the cost of providing governmental services by **requiring contributions from persons or enterprises engaged in economic activities** within that jurisdiction.” Merrion, at 137(emphasis added). The Merrion court relied heavily upon the Court’s decision in Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980).. In Colville, the Court recognized the authority of Indian tribes to tax cigarettes being sold both to tribal members and nonmembers on the trust lands lying within the impacted reservations there. The Court stated that “the power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.” Colville, at 152. See also TTEA, A Texas Corp. v. Isleta Del Sur Pueblo, 181 F.3d 676 (10<sup>th</sup> Cir. 1999)(tribal court properly exercised civil jurisdiction over non-Indian smokeshop owner over dispute regarding the validity of a contract not approved by Department of Interior). The United States Court of Appeals for the 10<sup>th</sup> Circuit has similarly held, after Strate, that the Montana presumption against tribal regulatory authority does not apply to disputes arising on tribal land. See Enlow v. Moore, 134 F.3d 993, 996 (10<sup>th</sup> Cir. 1998)(“in civil disputes involving non-Indian and Indian land, where no treaty provision or federal statute divests the tribal court of jurisdiction, the tribal court may properly exercise jurisdiction).

It appears from the cases discussing the Montana consensual relationship standard that the cause of action being asserted against the non-Indian must be pertaining to the consensual relationship between the Tribe and the non-Indian in order to confer subject matter jurisdiction upon the Court. So, for example, in Strate the fact that the non-Indian sub-contractor there was on the reservation working on a project under a general contract with the Tribe did not confer subject matter jurisdiction on the Tribal Court to adjudicate a tort action against that non-Indian because the tort action had nothing to do with the underlying contractual relationship between the non-Indian and the Tribe. See also FMC v. Shoshone-Bannock Tribe, 905 F.2d 1311 (9<sup>th</sup> Cir. 1990)(tribal court had jurisdiction over non-Indian who failed to comply with Indian preference law because non-Indian was working on tribal contract at the time). Conversely, the tribal court in Strate probably would have had jurisdiction to adjudicate any dispute regarding the sub-contractor's performance of its duties under the sub-contract had a dispute arose between the Tribe and the non-Indian.

Alltel entered into a consensual relationship with the Tribe when it merged with Verizon, whose subsidiary had negotiated and signed a contract to provide wireless telephone services to the Pine Ridge Indian Reservation. For purposes of jurisdiction, Alltel is treated as a nonmember individual. The recent United States Supreme Court decision in Plains Commerce Bank v. Long Family Cattle Company, 128 S.Ct 2709 (2008) does not alter this analysis because the Court in Plains Commerce held that Tribal Courts lack the authority to adjudicate claims that may result in the resolution of disputes pertaining to title to fee land. There is no dispute but that in this case the cellular communications at dispute are provided to tribal members on fee and non-fee land and the resolution of the dispute will not result in any resolution of an issue pertaining to ownership of fee land.

**Issue #5**

**WHETHER AN ARBITRATION CLAUSE IN THE CONTRACT BETWEEN THE OGLALA SIOUX TRIBE AND ALLTEL COMMUNICATIONS IS UNENFORCEABLE UNDER THE OGLALA SIOUX TRIBAL CODE.**

In August 2000, the Tribe and Alltel's now subsidiary interest entered into a contract for wireless telephone services to be provided to the residents of the Pine Ridge Indian Reservation. The contract, Tate Woglaka Service Agreement ("TWSA"), included an arbitration clause that both parties agreed upon and endorsed.

Arbitration is a matter of contract. It is a way to resolve disputes, when the parties have agreed to the process, and is conducted by a neutral third party, rather than by public officials such as judges or administrators. Arbitration is the process whereby parties voluntarily agree to substitute a private tribunal for the public tribunal otherwise available to them for the settlement of their disputes.

6 C.J.S. Arbitration § 1 (May 2010). The United States Supreme Court held that arbitration agreements must be rigorously enforced. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226-27 (1987).

The Supreme Court has acknowledged that "tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." Kiowa Tribe of Okla. v. Manufacturing Technologies, 523 U.S. 751, 760 (1998). There are only two recognized instances in which a tribe might be subject to suit. These instances include occasions where 1) Congress has authorized the suit or 2) the tribe has waived its immunity. Kiowa Tribe of Okla. v. Manufacturing Technologies, 523 U.S. 751, 754 (1998). For a tribe to waive sovereign immunity, such a waiver must be "clear." Oklahoma Tax Comm'n v. Citizen Band Potawatoni Tribe of Okla., 498 U.S. 505, 509 (1991). A waiver "cannot be implied but must be unequivocally expressed." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

The United States Supreme Court has held that an Indian Tribe that agrees to arbitrate a dispute has agreed to waive its immunity from suit for purposes of the enforcement of the arbitration award. This includes a waiver of immunity from suit in a case that seeks to compel the Tribe to submit to arbitration.

Fifteen years later, the role of the courts, with regard to arbitration clauses, was clarified: “Because arbitration provisions are in essence a matter of contract between the parties, it is for the courts to decide whether the parties are bound by a given arbitration clause.” Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002). When it is determined that an agreement to arbitrate exists, the clause precludes federal litigation prior to arbitration. Olle v. 5401 Western Ave. Residential, LLC, 569 F.Supp.2d 141, 144 (D.D.C. 2008). The parties in the instant case both acknowledge the presence of the arbitration clause in the TWSA, as both parties negotiated the terms of the contract, including the arbitration clause. Thus, the issue is whether the arbitration clause in the TWSA is sufficiently binding on both parties. This Court concludes that it is and the Tribe must submit to arbitration of this dispute.

The Oglala Sioux Tribal Court held that any arbitration clause in the TWSA did not preclude the jurisdiction of the court. In Sokaogon gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc., 86 F.3d 656 (7th Cir. 1996), the Tribe refused to be bound by an arbitration clause in a contract and sued, claiming that the contract was void and the Tribe could not be forced to arbitrate, as it had not waived its sovereign immunity. The Judge who authored the opinion noted:

[W]e must ask whether the language of the arbitration clause might have hookwinked an unsophisticated Indian negotiator into giving up the tribe’s immunity from suit without realizing what he was doing. We think this is an extremely implausible, as well as condescending, suggestion. The term “sovereign immunity” is a technical legal term, and anyone who knows what this means can also understand the arbitration clause.

Id. at 660. Similarly, the Tribe understands the meaning of “sovereign immunity,” as well as the requirements of an arbitration clause.

The issue further narrows to whether the Oglala Sioux Tribal Code renders arbitration clauses negotiated by the Tribe unenforceable. In agreeing to the inclusion of an arbitration clause in a contract, a party acknowledges the authority of a third party to settle the dispute. Equal Employment Opportunity Comm’n v. Waffle House, Inc., 534 U.S. 279, 294 (2002). However, the Oglala Sioux Tribal Code specifically provides: “The Oglala Sioux Tribal Court shall have jurisdiction of all suits wherein the defendant is a member of the Oglala Sioux Tribe and of all other suits between members and non-members who consent to the jurisdiction of the tribe.” Tribal Code § 20(a)-(b). “Any person who is not a member of the Oglala Sioux Tribe shall be deemed as having consented to the jurisdiction of the Oglala Sioux Tribe, by doing personally through an employee, through an agent or through a subsidiary . . . [t]he transaction of any business.” Id. It is a difficult theory for the Tribe to argue that it cannot be forced to arbitrate when it willfully consented to it. Justice Ginsburg wrote “the Tribe clearly consented to arbitration and to the enforcement of arbitral awards” and the clause “has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration.” Citizen Band Potawatomi Indian, 532 U.S. at 415.

The arbitration clause is enforceable, as courts have held Tribes have the ability to expressly waive their sovereign immunity by agreeing to arbitration. By enforcing the arbitration clause, this Court will assure other entities interested in conducting business with the Tribe or currently conducting business with the Tribe that they are being dealt with honestly and justly.



This Court finds however that the preliminary injunction shall remain in place pending arbitration because the whole purpose of the arbitration is to determine whether Alltel and Verizon had the authority to convey the telecommunications property without tribal consent. To allow the property to be conveyed prior to arbitration in essence permits the relief that Alltel must seek through arbitration.

This Court also finds that it has exclusive jurisdiction to enforce any arbitration award that is entered either for Alltel or the Tribe. This Court previously held in C&W Enterprises v. Oglala Sioux Tribe that it had the authority to enforce or refuse to enforce an arbitration award that had been entered against the Tribe. The United States Court of Appeals for the Eighth Circuit held that a South Dakota state court also had the authority to enforce the arbitration award entered in that dispute. This dispute is different however as it involves the right to remove property from the Pine Ridge reservation whereas the C&W dispute involved the award of monetary compensation against the Tribe. A South Dakota state court would not have the authority to enforce any arbitration award in this case as that court would not have the right to allow a party to enter the reservation to remove property from the reservation. That would be the exclusive province of this Court.

#### CONCLUSION

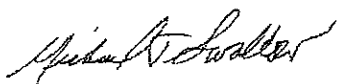
For the reasons stated herein this Court affirms the decision of the lower court insofar as it enjoined Alltel from removing its telecommunications property from the Pine Ridge reservation until the merits of the dispute between these parties are resolved. However, this Court reverses the decision below insofar as it refused to force the Tribe to submit to arbitration. This case is remanded with instructions to the lower court to require the Tribe to submit to arbitration and to stay further proceedings in this case pending arbitration, except the preliminary injunction



shall remain in effect. The lower court shall exercise exclusive jurisdiction over the enforceability vel non of any arbitration award.

So ordered this 17<sup>th</sup> day of December, 2010

BY THE COURT:



Michael T. Swallow  
Chief Justice

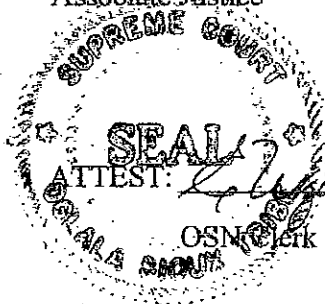


Sherman J. Marshall  
Associate Justice



B.J. Jones  
Associate Justice

Joe American Horse  
Associate Justice



Elizabeth Rowland  
Clerk of Court